No. 10,286

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EUGENE J. WESTPHALEN, CHARLES ZANELLA, and AETNA CASUALTY AND SURETY COMPANY (a corporation),

Appellants,

vs.

BANKERS INDEMNITY INSURANCE COMPANY (a corporation),

Appellee.

APPELLANTS' REPLY BRIEF.

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Table of Authorities Cited

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APPELLANTS' REPLY BRIEF.

In its final analysis there are but two points to be considered in this appeal. The first involves the right of an insurance company by the inclusion of clauses and limitations in compulsory or statutory policies of liability insurance which so restrict its obligations and liability to the public generally as to nullify and set aside the expressed purposes and objects of the statute which require the issuance of the policies to enable the insured to procure the necessary permit to engage in the business of highway carrier in California; and, second, the point raised for the first time in its brief in this Court by appellee that because the truck and trailer concerned in this litigation were being used at the time of the accident complained of

the purpose of delivering merchandise purchased by the operator so modified the classification of the assured as to render the owner and operator not highway carriers within the meaning of the act and thus relieved the appellee of its obligations under the policy to appellants.

As to the first proposition, appellants respectfully refer the Court to their opening brief and the citations there cited and quoted and again submit that the limitations relied upon by appellants are contrary to the spirit, purposes and objects of the regulatory statute through the requirements of which the policy was issued and for that reason are void and of no effect and unavailing as a defense to appellee so far as the rights of appellants are concerned.

As to the second proposition that the owner and operator of the truck had abandoned their classification as highway carriers some two weeks prior to the accident by reason of the fact that the operator, Curry, had commenced to deliver to the farmers of Napa and Sonoma Counties grape stakes which had been purchased by him in Mendocino and Humboldt Counties, appellants submit that this point, which was raised for the first time in the brief of appellee in this Court, does not operate to relieve appellee of its liability to appellants.

The California Highway Carrier's Act, cited and quoted in the briefs of both appellants and appellee provides in no uncertain terms that in order for a highway carrier to obtain a permit to operate a truck in California that he procure and *continue in effect during the life of the permit adequate protection*

(italics ours) against liability imposed by law for the payment of damages for personal bodily injury (or death) or for damages or destruction to personal property in amounts specified in the act. It can be asserted without fear of contradiction that the policy under consideration was issued because of the requirements of this statute and that it was so issued to the owner Tunzi, and later by endorsement to Peterson, as highway carriers. That these men were such highway carriers cannot be questioned. There is an abundance of evidence to the effect that Curry, the operator of the truck at the time of the accident was likewise engaged in the business of highway carrier under the permit issued to Tunzi (testimony of Curry, Tr. p. 101) and that he made at least several trips with the truck and trailer as such highway carrier transporting goods and merchandise for hire was amply established at the trial. (Testimony of Kay, Tr. p. 95.)

We have been unable to locate any decisions of the Courts in California directly in point or which have a direct bearing on this question. It has been held, however, in numerous cases that a deviation of a specified route by a motor vehicle insured under a statutory policy of liability insurance or the fact that the insured vehicle at the time of the accident out of which the cause of action arose was either not directly engaged in the business of transporting passengers for hire or had deviated from a specified course, would not relieve the insurer of liability under its policy of insurance.

Smith v. California Highway Indemnity Exchange, 218 Cal. 325, 23 Pac. (2d) 274;

Connell v. Commonwealth Cas. Co. (N. J.), 115 Atl. 352;

Devlin v. Herr (N. J.), 119 Atl. 446.

Where a motor carrier files a liability insurance bond with the commission as a prerequisite to the issuance of a certificate, neither the carrier or its bondsmen may successfully contend that the bond limits the liability imposed by statute, except as to the amount.

Utilities Ins. Co. v. Potter, 105 Pac. (2d) 259.

The tendency of more recent decisions is to permit recovery even though the designated route was not exactly followed.

Lopez v. Townsend, 25 Pac. (2d) 809, 37 New Mexico 574.

CONCLUSION.

Appellants respectfully submit that the judgment of the lower Court should be reversed.

Dated, Oakland, California,
March 19, 1943.

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